

JERSEY / JUDGMENT

A v G [2009] JRC 116 (09 June 2009)

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judgment

the commissioner: 1. On 3 rd June 2009, the Court imprisoned the respondent (to whom we shall refer hereafter as "the father") for eight weeks for his contempt of an order of the Court. We said we would set out our reasons for imposing that sentence more fully in a written judgment which we now do.

Background

2. In setting out the background we do so from the evidence of the representor (to whom we shall refer hereafter as "the mother"). Much of it will be common ground but elements may not be accepted by the father. 3. The mother was born in Russia and the father in Italy. They were married on 10 th January 2004 and have lived in Jersey since that time. The mother is employed as an investment book-keeper with a bank and the father is the owner/manager of a restaurant in St Helier. 4. The parties have a child, S, who was born in Jersey and who has lived here since that time. She is not yet of school age but attends a nursery school. 5. The mother and father separated on 18 th September 2006. The mother moved into the Women's Refuge with S. She subsequently sought and was granted a non molestation injunction against the father, and a further injunction stopping him from removing S from the jurisdiction. The parties reconciled in January 2007 and the injunctions were lifted by consent. 6. The parties separated again in June 2007, when the mother vacated the matrimonial home with S. They have not resided together since that time. The mother instructed her lawyer with regard to the issue of divorce proceedings on 1 st April 2009. 7. Whilst S has been under the care of the mother, it is clear that, as one would expect, the father has had regular contact with S by prior arrangement with the mother and in particular has assisted the mother in her care of S as a result of her having to work full time. The mother alleges that the father has failed to pay regular or adequate maintenance in respect of S. 8. The mother alleges that on or about Thursday 23 rd April, the father asked the mother if he could take S to St Malo in France on Monday 27 th April, 2009 for a day trip. It was not unusual for the father to travel to France, as he regularly stocks up with wine, cheese, pasta and other items for his restaurant which he finds it cost effective to purchase in France. The mother says she did not worry about the father taking S on such a trip, as she had no indication that he would not be returning that same evening. 9. On Monday 27 th

April 2009, the father took S to Italy. He subsequently informed the mother that S is going to remain in Italy permanently, living with his extended family, and attending nursery school. 10. On 29 th April 2009, the mother applied by way of Order of Justice for and obtained from the Court an immediate interim injunction requiring the father to return S to the jurisdiction of the Royal Court and to her care. In that Order of Justice the mother also sought a residence order under Article 10 of the Children (Jersey) Law 2002 in her favour. The Order of Justice was served upon the father's lawyers in Jersey on 30 th April 2009 and on the father personally in Italy on 15 th May 2009. The father has since returned to Jersey but without S and the mother therefore applied to the Court by way of representation alleging his contempt of the Court's order of the 29 th April 2009. The father was arrested and brought before the Court on Wednesday 3 rd June 2009. 11. The issue before the Court on 3 rd June 2009 was the father's failure to comply with its order that S should be returned to the jurisdiction and to her mother. By way of evidence the Court had before it the affidavit sworn by the mother in support of the Order of Justice and it had heard her evidence in support of the representation alleging contempt on 2 nd June 2009. We did not hear evidence from the father but received submissions from Mr Le Quesne who had been instructed that day. 12. Mr Le Quesne confirmed that the father had not returned S to Jersey. The father had apparently instituted proceedings in Italy that day seeking an annulment of the marriage and an order that S reside with him in Italy. Initially, he indicated through Mr Le Quesne that no order had yet been issued by the Italian courts but when asked whether he was in a position to bring about her return, he said he could not do so, because there would be a court order that day which could only be released on his personal attendance in Italy. He had no proposals to put to the Court to purge his contempt. 13. Mr Le Quesne rightly drew to our attention the Hague Convention on the Civil Aspects of Child Abduction which provides an expeditious method of returning a child taken from one member nation to another. The Convention was drafted to ensure the prompt return of children who have been abducted from the country of habitual residence or wrongfully retained in a contracting state not their country of habitual residence. The primary intention of the Convention is to preserve whatever status quo child custody arrangement existed immediately before an alleged wrongful removal or retention, thereby deterring a parent from crossing international boundaries in search of a more sympathetic court. The Convention does not provide any substantive rights but provides that the court in which a Hague Convention action is filed should not consider the merits of any underlying child custody dispute but should determine only that country in which those issues should be heard. 14. It is manifest that Jersey is S's habitual residence. She was born here and has lived here since. It is this jurisdiction that should deal with any child custody disputes. Mr Le Quesne conceded that under the terms of this Convention, it was likely that the Italian courts would order the return of S to Jersey, but notwithstanding that advice, the father still declined to return her voluntarily. He retains the hope of persuading the Italian courts not to return S. 15. The mother had understood that S was being looked after in Italy by her grandmother (the father's mother) who was aged 73, but we were informed at the hearing that she was in fact staying with her godparents, whose address the father had some initial

difficulty in supplying. Her passports (she has both Italian and Jersey passports) were apparently held by his lawyer in Italy. 16. Mrs Gilbert for the mother confirmed that the Jersey authorities had initiated the procedure under the Hague Convention for S's return and that as at 25 th May 2009 a district judge in Italy had become seized of the matter. It had been confirmed that morning that no orders had been made in Italy in relation to S. However, she pointed out that with the cooperation of both the authorities in Jersey and in Italy there would inevitably be some considerable delay before an order could be obtained from the Italian authorities ordering S's return. 17. The father maintains that the decision to remove S from Jersey was not unilateral. We have heard no evidence from him on this and are therefore not in a position to make a determination but we would say that judging by the speed with which the mother obtained an injunction for the return of S and her demeanour when giving evidence in support of her representation, we think that most unlikely. We also think it inherently unlikely that a mother would agree to her young daughter being shipped off permanently to unspecified relations in this way. 18. In our view, the removal of S from her mother to a foreign jurisdiction is reprehensible and constitutes appalling mistreatment both of S and of the mother. It is the very conduct which the Hague Convention seeks to deter. Having said that, the removal of S is not the conduct which constitutes the contempt - that lies in the father's refusal to comply with the Court's order to return her. 19. Having heard evidence from the mother when she brought her representation and in the light of the father's submissions before us, we were satisfied beyond all reasonable doubt that the father was in control of S and in contempt of Court. We regarded the contempt as serious. 20. Mrs Gilbert sought an order that the father be remanded in custody until such time as S is returned to the jurisdiction and to the care of the mother. Mr Le Quesne doubted whether it would be proper for such an open-ended order to be made and if the Court was minded to impose a custodial sentence, then it would be better for that sentence to be for a fixed period. It was also important he said to give the father some incentive to comply with the Court's order. He suggested that any custodial sentence should be suspended to allow the father time to purge his contempt but conceded that apart from ordering the surrendering of the father's passport, there was little that could be done in practice to prevent the father leaving the jurisdiction. 21. We had no doubt that the father should be sentenced to imprisonment for his contempt. Although it is clear that the Court has an inherent power to fine or imprison for contempt under Jersey law (see *Caversham Trustees Limited v Patel*

[2007] JLR N 60) we were not shown any authority as to how the Court should exercise its powers in this situation. We shared Mr Le Quesne's concern about the propriety of an open ended sentence and agreed with him that whatever sentence we impose should give the father an incentive to comply, because ultimately we were concerned with the best interests of S and her expeditious return to this jurisdiction. 22. We had regard to Halsbury's Laws of England (4 th Edition) paragraph 506 and noted that under the Contempt of Court Act 1981, the English courts can only commit to prison for contempt for a fixed term and there would appear to be no power under English law to detain or remand in custody pending sentence, except in the case of contempt in the face of the court (i.e. conduct within the

courtroom itself). Note 3 of paragraph 506 referred to the case of *Delaney v Delaney*

- (1996) QB 387 at 400 in which Sir Thomas Bingham MR said that where a sentencing judge is uncertain as to what sentence he should impose, he can impose a sentence at the top end of the appropriate bracket while at the same time directing that the matter be restored for further hearing at the end of a suitable period; and at that hearing a judge may (1) affirm the original order and leave the contemnor in prison, subject to his right to make further applications to purge; (2) order the immediate release of the contemnor; or (3) indicate a future date at which the contemnor will be released, subject again to the right of the contemnor to make further application to purge in the interim. 23. We found *Delaney* helpful in that it provides for a fixed term of imprisonment by way of punishment for the contempt of court, but gives the Court an opportunity to review the sentence and the contemnor every incentive to purge his contempt. 24. Although a much higher sentence could be justified, we concluded that eight weeks imprisonment was a sentence at the top end of the appropriate bracket, which sentence we imposed upon the father, but we directed that the matter be restored to the Court on Tuesday 9 th June at 10.00 a.m. for a further hearing. The significance of that date is that we were informed that there was a direct flight from the nearest airport to where S was living to Jersey on Saturday 6 th June and by 8 th June therefore the father would have had ample time to have purged his contempt. We directed that at the hearing on 9 th June the Court may (a) affirm the sentence, and leave the father in prison or
- (b) order the father's immediate release or (c) indicate a future date at which he shall be released, the whole subject to the right of the father in the interim to make an application to the Court to purge his contempt. *Authorities Children (Jersey) Law 2002. Caversham Trustees Limited v Patel*

[2007] JLR N 60. Halsbury's Laws of England (4th Edition). *Delaney v Delaney* (1996) QB 387. Page
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